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No. 00-1167

In the

Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation and
membership organization, et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant to
Bi-State Compact, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's clear holding that a temporary moratorium on land use *can* require compensation for a temporary taking of property (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)), is it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation?

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a *different* case barred issuing permits to *other* landowners, while the agency's own regulations precluded all use of the Petitioners' land?

3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation?

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INTEREST OF AMICUS CURIAE[1]

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, No. 99-2047 (argued on Feb. 26, 2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past two decades.

PLF previously participated as amicus curiae in this case. PLF filed amicus briefs in support of Tahoe-Sierra Preservation Council and others (Petitioners herein) on appeal from the United States District Court for the District of Nevada and in support of a petition for rehearing en banc of the Ninth Circuit panel's decision on appeal. PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. Specifically, PLF argues that the Ninth Circuit Court's decision in this case conflicts with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). PLF also argues that it is common in property law to divide interests into temporal segments, and that a contrary approach—a theory of the

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

temporal whole—in takings law does not provide the individual protections required by the Constitution.

STATEMENT OF THE CASE

Petitioners are owners of single-family residential lots in the Lake Tahoe Basin. On June 25, 1981, the Tahoe Regional Planning Agency (TRPA) adopted the first in a series of moratoria prohibiting residential use in parts of the Lake Tahoe region involved in this litigation. The "temporary" building prohibition lasted 20 years, and prevented Petitioners from building residences or making any other economically reasonable use of their property during that period of time.

Petitioners filed an action asserting that TRPA's restrictions on the use of their lots amounted to temporary takings of private property for public use without just compensation. The United States District Court for the District of Nevada agreed and held that Ordinance 81-5 and Resolution 83-21 constituted a categorical taking of Petitioners' property and awarded Petitioners compensation for the regulatory taking. In reaching this conclusion, the court made the following finding of fact: Ordinance 81-5 and Resolution 83-21 did in fact deny the Petitioners all economically viable use of their land. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999).

On appeal, the Ninth Circuit Court of Appeals reversed, although it accepted the factual finding that TRPA's moratoria effectively deprived Petitioners of all economically viable use of their property. Instead, the reversal was based on the court's assertion that the Takings Clause does not require compensation when a regulation is intended from the outset to last for a limited period of time. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th

Cir. 2000). This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional law.

SUMMARY OF ARGUMENT

This case asks whether the Takings Clause of the Fifth Amendment requires that government compensate private property owners when building moratoria deny all economically viable use of their property, or whether, to the contrary, there is something about building moratoria that allows government to deny use of property without compensating the property owner. Because moratoria can affect landowners to the same extent as permanent regulation, the question of whether moratoria can create takings goes to the heart of the Constitution's protection of private property.

The Ninth Circuit Court of Appeals held that building moratoria are different from other government activity that violates the Fifth Amendment because moratoria are intended to be temporary and deny landowners all use of their property for only a small piece of the "temporal whole." Thus, under the Ninth Circuit's theory, property owners cannot receive compensation for the time they are denied use of their property because the property may retain some value after moratoria are lifted. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922), Justice Holmes explained that government's power to redefine the range of interests included in the ownership of property is constrained by the Constitution. Justice Holmes was discussing the enforcement of the protection against physical appropriations, but the message is no less applicable to regulatory takings cases.

> If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared."

Lucas, 505 U.S. at 1014 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415).

In this case, the Ninth Circuit's theory of the "temporal whole" defines property interests so broadly that moratoria, temporary by nature, cannot create a temporary taking. This is so even if moratoria last for decades and deprive all use of property for a large chunk of the temporal slice that makes up the property owner's life. Under the Ninth Circuit's ruling, a landowner's private property rights can disappear, and no compensation is due for the loss. That result conflicts with decisions of this Court and of various state courts that recognize temporary takings can and do result from building moratoria, and disregards the focus of the Takings Clause—the impact of regulation on the individual property owner, not the advantage realized by the sovereign.

ARGUMENT

I

THE OPINION BELOW CONFLICTS WITH THE LONG-ESTABLISHED PRECEDENT OF THIS COURT

A. The Theory of the "Temporal Whole" Applied by the Ninth Circuit to Deny Appellants' Takings Claim Is Unsupportable After *Lucas v. South Carolina Coastal Council*

The Takings Clause of the Fifth Amendment to the United States Constitution consists of just 12 words, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. But the simple and clear mandate of the Takings Clause has proven far from simple to apply to the myriad circumstances where the interests of government and private property owners intersect. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court noted the difficult task of determining what constitutes a taking.

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Citations omitted.

The question in *Penn Central* was whether denial of an application to construct an office building on top of New York City's famous Grand Central Terminal constituted a taking. The proposed addition to the Terminal violated a Landmarks Preservation Law under which the Terminal was designated a landmark and the "city tax block" it occupied was designated a "landmark site." Appellant owners of the Terminal also owned other property in the same area of midtown Manhattan.

The *Penn Central* majority noted that takings cases examine the character of government action and the nature and extent of interference with rights in the parcel as a whole. *Id.* at 130-31. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. The interference with appellants' property rights in *Penn Central* was insufficient to effect a taking because the restrictions "afford appellants opportunities further to enhance not only the Terminal site proper [(the City tax block)] but also other properties." *Id.* at 138. Thus, the relevant parcel for takings analysis included not only the air space above the Terminal, but the Terminal itself, the land on which it sits, and appellants' other properties in the area.

The aggregation of interests in *Penn Central* was condemned 14 years later. In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n.7, this Court cited *Penn Central* as "an extreme—and, we think, unsupportable—view of the relevant calculus." Yet, in this case, the Ninth Circuit Court of Appeals employed the very technique disapproved in *Lucas* to arrive at a theory of the "temporal whole." *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d at 776-77.

The Ninth Circuit Court noted that the relevant property interests are the "whole parcels of property that [Petitioners] own." *Id.* at 779. Apparently, those whole parcels include the "use" of the property "from the present to the future." *See id.* at 782. Development moratoria, according to the court, are "finite temporal segments" (*id.* at 778) that deny Petitioners "only a small portion of this future stream; the 32 months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties" (*id.* at 782). Because the moratorium on development did not deprive Petitioners of all future use of their property, there was no taking. Government did not interfere with the rights in the "temporal whole" of Petitioners' property rights.

In the same way the *Penn Central* majority increased the physical size of the relevant parcel by including other nearby properties owned by the same entity, the Ninth Circuit Court increased the "temporal size" of the relevant property interest by looking at the economically viable use a property retains after development moratoria have run their course. Under the Ninth Circuit's theory, a development moratorium lasting 3 years or 25 years would not constitute a taking of the "temporal whole" because there is a potential for an economically viable use of property sometime in the future.

The "parcel as a whole" language in *Penn Central* describes the physical property that constitutes the relevant

parcel in a regulatory takings claim. In *Tahoe-Sierra*, the Ninth Circuit Court divides property into different dimensions—spatial, functional, and temporal—and attempts to force all three into a "parcel as a whole" type theory. *See Tahoe-Sierra*, 216 F.3d at 774-76. In other words, a taking occurs when government allows no use (the functional dimension) of an entire parcel (the spatial dimension), for the useful life of the property (the temporal dimension). *See id.* at 776. The Ninth Circuit Court does make one exception—severance of the spatial dimension, according to the court, is the norm in physical appropriation cases. *Id.* at 779.

Depending on the facts of a case, it may be that there is no taking when government denies some, but not all, economically viable use of a parcel or when government denies all use of only a discrete portion of a parcel. But it does not follow that there is no taking when government denies all use of property for a period short of its useful life. The reality is that the useful life of land generally far exceeds the human life span. Thus, the Ninth Circuit's rule could easily deprive landowners of all use of their land for an entire lifetime—the only relevant "temporal dimension" from the viewpoint of the individual whose rights are supposed to be protected by the Constitution.

B. Property Law Routinely Divides Property Interests into Temporal Segments

The Ninth Circuit denied Petitioners' takings claims because, according to the court, development moratoria deny economically viable use of property for only a "temporal slice" of the total fee interest. *Tahoe-Sierra*, 216 F.3d at 779. The court ignores the fact that property law—even takings law—routinely divides property interests into temporal segments. Property interests are divided into present interests and future interests, a life estate, or estates for years (leases for several years, a single year, months, or weeks). Each of these interests

includes the use of property for a "temporal slice" of the total fee interest.

In *United States v. General Motors Corporation*, 323 U.S. 373, 374 (1945), this Court had no trouble requiring compensation for the temporary taking of a leasehold interest. The United States exercised its power of condemnation under the Second War Powers Act of March 27, 1942, to temporarily occupy—for one year—a portion of a warehouse building leased to General Motors for a period of 20 years. *Id.* at 375-76. This Court examined the scope and meaning of critical terms in the Takings Clause. "Property" encompasses each of the interests a citizen holds in a physical thing. *Id.* at 377-78. An individual's interest

> may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. *The constitutional provision is addressed to every sort of interest the citizen may possess.*

Id. at 378 (emphasis added).

The term "taken" focuses on the deprivation experienced by a property owner and not on the interest acquired by government. *Id.* Thus, "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Id.* The amount of compensation constituting "just compensation" depends on the interest taken—whether government takes an owner's whole interest, or chops an owner's interest "into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him." *Id.* at 382.

The piece chopped from the owner's interest in *United States v. General Motors Corporation* was the period of time General Motors was denied all use of its leasehold interest. *Id.* And the need to pay compensation was based on the temporary deprivation of use of the property—it did not depend on government's physical occupation of the property.

> [W]hether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

Id. at 378.

In another War Powers Act case, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949), this Court upheld an award of just compensation for a temporary taking of land, plant, and equipment, and determined that the United States should have paid compensation for the going-concern value of the family laundry business (*id.* at 16). As in *General Motors Corporation*, the deprivation of use of property for a limited period of time was key (*see id.* at 6, 14-15). The temporary taking interrupted an ongoing business, thereby appropriating an established customer base and forcing the owners of the laundry to wait and see what remained of their investment when government was finished using the property. *Id.* at 14-15 & n.6.

General Motors and *Kimball Laundry* were both condemnation cases, but the same reasons for compensating a temporary denial of use of property apply in the context of regulatory takings. *See Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871). The deprivation experienced by a property owner is the same regardless of the mechanism utilized by government to deny all use of the property. In *First English Evangelical Lutheran Church of Glendale v. County of Los*

Angeles, 482 U.S. 304, 318 (1987), this Court acknowledged that temporary takings denying all use of property "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."

II

THE LOWER COURT'S FAILURE TO RECOGNIZE TEMPORARY REGULATORY TAKINGS CONFLICTS WITH DECISIONS OF STATE COURTS

State courts recognized temporary regulatory takings even before *First English*. In *Schiavone Construction Co. v. Hackensack Meadowlands Development Commission*, 486 A.2d 330 (N.J. 1985), a series of resolutions placed a 19-month moratorium on real estate development. *Id.* at 331-32. The Supreme Court of New Jersey determined that temporary land use restrictions may constitute a taking if sufficiently extensive and prolonged. *Id.* at 332-33.

The New York Court of Appeals, in a post-*First English* case, found both physical and regulatory takings when New York City imposed a moratorium on the demolition or conversion of structures containing single-room occupancy units and required that owners rehabilitate all vacant units and offer them for rent. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1060-61 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). The court held that the loss of possessory interests—including the right to exclude—constituted a per se physical taking. *Id.* at 1064. The law also created a regulatory taking by "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (*id.* at 1065 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))), and by depriving owners of the right to make economically viable use of their properties (*id.* at 1066-67).

St. Aubin v. Biggane, 381 N.Y.S.2d 533 (1976), a New York Supreme Court, Appellate Division, case, dealt with a moratorium that prevented plaintiffs from deriving any economic advantage from their property for two-and-a-half years, and that allegedly would continue to deny all use for another year-and-a-half. *Id.* at 535. The New York court held that the facts raised a constitutional takings claim and that a moratorium cannot last for an unreasonable time. *Id.*

These state courts had no trouble finding that takings may result from government acts that deny all use of private property for a period of time less than the temporal whole—even when those acts were never intended to be permanent.

III

THERE IS NO CONSTITUTIONAL DIFFERENCE BETWEEN A PERMANENT REGULATION INVALIDATED AS AN UNCONSTITUTIONAL TAKING AND A TEMPORARY REGULATION THAT EFFECTS A TAKING

The Ninth Circuit Court decided that temporary takings are created when ordinances that create permanent takings are invalidated—temporary takings are not created by moratoria designed from the outset to last for a limited period of time. *Tahoe-Sierra*, 216 F.3d at 778. But government can create a temporary taking under the Fifth Amendment in the same way it creates permanent takings. A regulation that does not substantially advance a legitimate state interest or that denies an owner economically viable use of his property effects a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). "[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1017.

Development moratoria, originally intended to last for a brief period of time, can and oftentimes do remain in effect for

many months or even years.[2] Indeed, as demonstrated by the facts of the case before this Court, temporary planning prohibitions may be effective for at least as long as a "permanent" regulation that is challenged and invalidated in a court of law. Under the Ninth Circuit's rule that temporary moratoria cannot give rise to a taking, a landowner denied all use of his property for five years pursuant to a temporary building moratorium will not be compensated for a temporary taking. But a landowner denied all use of his property for five years pursuant to a "permanent" regulation that is invalidated by a court is entitled to compensation for a temporary taking. This result might be supportable if the purpose of the Fifth Amendment were to punish wrong or irresponsible regulatory activity. But it is not—the Fifth Amendment protects and secures the rights of the individual as against government by providing that a landowner must be compensated when his property is taken for a public use. U.S. Const. amend. V; *see Pumpelly v. Green Bay Co.*, 80 U.S. at 177-78.

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[2] *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1068 (11th Cir. 1996), *cert. denied*, 522 U.S. 981 (1997) ("Originally, the moratorium was to last for 150 days, but it eventually was extended to last almost a year."); *Seawall Associates v. City of New York*, 542 N.E.2d at 1061 (city imposed 18-month moratorium on demolition or conversion of some residential structures, which was extended for five months; a subsequent law "extended the prior moratorium for an initial five-year period with the possibility of unlimited renewals"); *Bank of the Orient v. Town of Tiburon*, 269 Cal. Rptr. 690, 691-92 (Ct. App. 1990) (town adopted a "45-day interim urgency ordinance," which was extended for two months and extended again for a year; voters adopted additional "development moratorium" intended to last "some 15 months longer than the previously enacted moratorium").

The Ninth Circuit Court's decision was based, at least in part, on concern about the possibility of the widespread invalidation of temporary planning moratoria.

> Given the importance and long-standing use [of] temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

Tahoe-Sierra, 216 F.3d at 777.

But, in *Pumpelly*, Justice Miller made it clear that the paramount concern should be the impact of government activity on the individual.

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority

> for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Pumpelly v. Green Bay Co., 80 U.S. at 177-78.

Although the useful life of the Tahoe properties may extend well beyond TRPA's planning moratorium, the lives of the individual property owners represent much smaller slices of the temporal whole. Property owners should not be denied compensation for the 20-year period they were unable to use their property just because the property is expected to retain some value when the moratorium is lifted.

CONCLUSION

For these reasons, Amicus respectfully requests that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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